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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding that intracorporate transfers of gas produced by federally or state regulated pipelines, gas distributors or end users, are "first sales" under the Natural Gas Policy Act of 1978, which must be priced at the maximum ceiling prices of that Act rather than at lower cost of service, area or national rates; a holding in direct conflict with the holding of the highest court of West Virginia on that issue.*

2. Whether the Court below erred in holding that the Natural Gas Policy Act of 1978 terminated, as to all "first sales," the pricing authority of the Federal Energy Regulatory Commission under the Natural Gas Act, so that vacation, rather than remand, was proper with respect to an agency rule setting forth its policies under the latter Act.

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* Now before this Court on a Petition for a Writ of Certiorari in Case No. 81-1672, *Pennzoil Company v. Public Service Commission of West Virginia.*

PARTIES BELOW

American Gas Association
Arizona Electric Power Cooperative, Inc.
Ciba-Geigy Corporation
Clarke-Mobile Counties Gas District
Colorado Interstate Gas Company
Columbia Gas Transmission Corp.
Conecuh-Monroe Gas District
Consolidated Gas Supply Corp.
Delvan Development Corp.
Ecee, Inc.
El Paso Natural Gas Company
The Federal Energy Regulatory Commission
Kansas-Nebraska Natural Gas Company
Kansas State Corporation Commission
Kentucky-West Virginia Natural Gas Company
Michigan-Wisconsin Pipe Line Company
Mid-Louisiana Gas Company
Mobile Gas Service Corp.
Natural Gas Pipeline Co. of America
Northern Natural Gas Company
Northwest Pipeline Corp.
The Public Service Commission of the State of New York
The Public Service Commission of Wisconsin
The State of Michigan and the Public Service Commission of Michigan
Scotch Plywood Co. of Alabama
Southern Natural Gas Company
United Gas Pipe Line Corp.
Wallace Energy Corp.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arizona Electric Power Cooperative, Inc. ("AEPCO"), an intervenor supporting the respondent below, petitions for a writ of certiorari to review the December 23, 1981 decision of the United States Court of Appeals for the Fifth Circuit in *Mid-Louisiana Gas Company, et al.*, v. *Federal Energy Regulatory Commission*, Case No. 80-3804, and *Consolidated Gas Supply Corporation* v. *Federal Energy Regulatory Commission*, Case No. 80-4010.[1] Petitioner also seeks summary reversal of that

[1]The case below was heard and decided before the effective date of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (October 14, 1980). Since the first of the several petitions for review of the FERC orders was filed by Mid-Louisiana Gas Company, which resides, is located and has its principal place of business in the present Fifth Circuit, it would appear that that Circuit would retain jurisdiction in the event of a remand by this Court. See NGPA Section 506, 15 U.S.C. §3416.

decision. The Court's decision vacated Order Nos. 58 and 98 issued by the Federal Energy Regulatory Commission ("FERC") on November 14, 1979, and August 4, 1980, respectively, on the basis of its interpretation of a statutory "first sale" under the Natural Gas Policy Act of 1978, ("NGPA") 15 U.S.C. §§3301, *et seq.*, and the relationship between the NGPA and the Natural Gas Act ("NGA") 15 U.S.C. §§717, et *seq.*, as to the pricing of pipeline produced gas.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 664 F.2d 530, and is reprinted in Appendix A.[2] The Commission's Order Nos. 58, 98 and its Order on Rehearing, No. 102, are not reported and are set out in Appendix B.[3]

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 23, 1981 (App. C-1). On January 11, 1982, the Court extended the time for petitions for rehearing until January 20, 1982 (App. C-2). Petitions for rehearing en banc filed by AEPCO and the State of Michigan and the Public Service Commission of Michigan, and for rehearing filed by the Public Service Commission of the State of New York, were denied on February 5, 1982 (App. C-3). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[2]On April 12, 1982, the Public Service Commission of the State of New York filed a petition for a writ of certiorari and a separate appendix containing all pertinent decisions, orders and statutes. To avoid unnecessary duplication, AEPCO has agreed to pay a share of the costs of that Appendix and will rely on it herein. In addition, AEPCO includes at the end of this petition one further section labeled "Appendix E - Additional Statutes".

[3]References to the Appendix to this petition are hereafter given as "(App. ____)".

STATUTES INVOLVED

The Statute upon which the Court of Appeals decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, *et seq.*, the relevant portions of which appear in Appendix D and Appendix E.

STATEMENT OF THE CASE

In 1938, Congress enacted the Natural Gas Act which gave the Federal Power Commission (FPC)[4] authority to regulate rates for natural gas sold by interstate pipelines. Such pipelines purchase or produce natural gas, transport it through interstate pipelines, and sell it at wholesale to resale gas distributors or at retail to direct industrial customers.

Historically, most natural gas transported by interstate pipelines was purchased from independent producers. The FPC permitted the pipelines to pass through to their customers the cost of purchased gas. However, many of the major interstate pipelines produced significant quantities of gas from properties which they owned or controlled. Most of this gas was used to serve the pipelines' own customers, although some was sold at the wellhead to other pipelines or end users which were not regular customers of the pipeline.

From the beginning of federal regulation under the NGA, rates of interstate pipelines were established on a "cost of service" basis. Under this method, pipelines recover all operating expenses, depreciation, taxes, and a fair return on investment from their customers. The pipeline's rates are determined by dividing total costs by the volume of gas produced. No unit rate, per Mcf or

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[4]The functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission (FERC) in 1977 by the Department of Energy Act, Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565.

MBTU,[5], was ever set for gas produced by the pipeline for use by its own customers. *Canadian River Gas Co., et al.*, 3 FPC 32 (1942), *aff'd sub nom. Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945). The costs associated with exploration, development and production are included with all other items in the cost of service and are an element in the final rate. Under the cost of service method, pipelines recovered these exploration and development costs irrespective of the ultimate cost of the natural gas or whether these efforts were even successful. Thus, the entire risk of a pipeline's exploration and development program was borne by its cstomers and they paid only the actual cost whether it was above or below the price charged by independent producers.

In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), this Court determined that under the NGA, the FPC also had jurisdiction over the prices charged to interstate pipelines by independent producers. Following *Phillips*, the Commission initiated several proceedings to determine the maximum prices which independent producers could charge. *Permian Basin Area Rate Proceeding*, 34 FPC 159 (1965), *aff'd, Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *National Rates for Jurisdictional Sales of Natural Gas*, 56 FPC 509 (1976), *aff'd sub nom. American Public Gas Association v. FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). In fixing these prices, the Commission established cost related maximum *unit* rates, first on an area and then on a national basis. Such rates were geared to average producer costs. Under unit rates, the entire risk of unsuccessful production efforts was on the

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[5]An Mcf is a thousand cubic feet of natural gas. An MBTU is a thousand British thermal units. The heating value of one Mcf is approximately one MBTU.

producer. In addition, if the producer's costs exceeded the average, he would not earn a fair return on his investment and his stockholders would bear the loss. If he was more successful than the average, he realized greater profits.

In the *Pipeline Production Area Rate Proceeding* (Phase I), 42 FPC 738, (1969), *aff'd sub nom, City of Chicago* v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 1074 (1972), the FPC found that interstate pipeline production should enjoy parity of pricing with independent producers only with respect to leases acquired after October 8, 1969 — the date of its decision. Producing wells on leases acquired prior to that date would continue to be treated on a cost of service basis, *as would future wells on these leases.* Production from leases acquired after that date would receive the same treatment as production by independent producers, *i.e.*, the applicable area or national unit rate. Thus, on leases acquired after the Commission's decision, the pipelines would assume the risk of loss in the same manner as independent producers.

Because of the acute gas shortages and extensive curtailments on most pipeline systems in the mid-1970s, the FPC also gave the higher area or national rates to pipeline producers on old leases as an inducement to drill more wells on leases which would otherwise have received cost of service treatment. Thus, in *Just and Reasonable National Rates for Sale of Natural Gas*, 51 FPC 2212 (1974), *aff'd sub nom., Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1976) *cert.den., sub nom, California Co.* v. *FPC*, 426 U.S. 941, (1976), the FPC determined that production from wells completed after January 1, 1973 on leases acquired prior to October 8, 1969, would also be eligible for area or national rates. *The FPC did this in a manner which insured that the pipelines would*

always be given the higher of cost of service rates or area or national rates. Thus, on a case-by-case basis, the FPC granted cost of service treatment for any production or portions thereof if the pipeline could "show in a rate proceeding that special circumstances exist which justify different treatment" (18 CFR 2.66(a)(4)). These special circumstances were that the applicable area or national rate was *less* than the cost of service rate. In addition, pipelines could obtain cost of service treatment for new properties through a settlement agreement with their customers. The Commission approved several such agreements.

In 1978, the NGPA was enacted as compromise legislation after extensive deliberation. That Act established a scheme of maximum price ceilings for different categories of natural gas. It provided that some categories were to remain permanently subject to regulation and others were to be deregulated on a fixed time schedule beginning on January 1, 1985.[6] Congress specified different prerequisites for eligibility for the ceiling price in each of the respective NGPA categories of natural gas. However, the existence of a statutory "first sale" is a common and indispensable prerequisite for eligibility for any NGPA price. Section 2(21)(A) specifies that a first sale means any volume of natural gas sold *to* an interstate pipeline or intrastate pipeline or local distribution company or a direct gas consumer. Section 2(21)(B) specifically excludes from the scope of a statutory "first sale" the sale of any volume of gas *by* an interstate pipeline, intrastate pipeline or local distribution company or affiliate thereof "unless such sale is attributable to volumes of natural gas produced"

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[6]Certain categories of "high cost" gas have already been deregulated.

by such a seller. The legislative history of Section 2(21) does not shed any light on its intended meaning, as noted by the Court below:

> Congress did not explain its definition of first sale either in the Committee reports that accompanied the various drafts of the NGPA or in the discussions that occurred in each House. [App. A-10].

In Order 58, acting pursuant to its NGPA authority under Section 501(a) to make substantive rules and its authority under Section 501(b) to define terms, FERC interpreted Section 2(21) as excluding from the definition of first sale, the intracorporate transfers of gas from a pipeline's production division to its transmission division. The agency relied on the "unless" clause of Section 2(21) and upon the literal language of that provision which required "that a sale be 'attributable' to the pipeline's own production" (App. B-3). Under this ruling, as FERC expressly noted, "if a pipeline were to sell its production at the wellhead, in an offsystem sale, such a sale would generally qualify under 18 C.F.R. 270.203(a) as a first sale." (App. B-2).

FERC held that NGPA maximum ceiling prices should be applied to actual sales rather than to *bookkeeping and accounting entries of a corporation.* It also noted that treating intracorporate transfers as sales would extend NGPA first sale jurisdiction to all end users which produced their own gas and found that such an extension of agency jurisdiction could discourage industrial self-help measures and contravene the policy expressed in Section 608 of the Public Utility Regulatory Policy Act, 15 U.S.C. §717f(c) and (d) (App. B-5 - B-6).

On rehearing, the five pipeline petitioners below[7] urged the Commission to impute a sale at the point at which the pipeline takes its production into its general system supply. FERC acknowledged that it had discretionary authority to do this under Section 501 of the NGPA and thereby accord first sale treatment to pipeline production (App. B-65). However, FERC stressed that its authority was *discretionary* rather than *mandatory* and that Congress had expressly delegated to it power to define the term first sale as it may apply to intracorporate transfers (App. B-65).

FERC noted that in its administration of the NGA, it had never treated such an intracorporate transfer as a sale. It relied on the facts that no contracts govern such transfers; no certificates under the NGA were issued or required for such transfers; and treating such transfers as sales could not be reconciled administratively with certain provisions of the NGPA. In addition, the agency found that the maximum lawful price under Section 104 of the NGPA assumed the existence of a just and reasonable rate applicable to the sale of natural gas before the enactment of the NGPA and since there was no sale, there was no just and reasonable unit rate applicable to the transfer. The Commission also noted that the provisions of Section 315 of the NGPA governing the duration of contracts, bona fide offers, and right of first refusal all depend upon the existence of a contract for their applicability and effect and no contracts are made for intracorporate transfers (App. B-66).

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[7]Mid-Louisiana Gas Co., Kansas-Nebraska Natural Gas Co., Michigan-Wisconsin Pipe Line Co., Consolidated Gas Supply Corp. and Kentucky-West Virginia Natural Gas Co.

In Order 98, the Commission determined that since pipeline production which was the subject of an intracorporate transfer was not a "first sale", it was called upon to exercise its discretionary powers under the NGA to determine whether pipeline production which had received area or national rates under the NGA should continue to receive such rates or should be made eligible for NGPA prices. The Commission thus extended its parity of rate treatment policy by granting NGPA prices to pipeline production which had been receiving area or national rates under the NGA. (App. B-25).

Order 98 also continued the Commission's policy respecting pipeline production by denying NGPA prices to all gas which had ever received cost of service rate treatment. FERC gave as the reason for this policy the fact that pipeline customers had paid for all exploration and development costs of such properties and equity required that the customers who had borne the risks receive the benefits of these production efforts (App. B-26).

Order 98 applied the same rationale to deny parity of pricing treatment to pipeline producers who had been permitted to depart from the area or nationwide rate and receive a higher cost of service rate under the "special circumstances provisions" of (18 CFR 2.66(a)(4) or a settlement agreement with its customers. It specifically noted that pipelines receiving such treatment had passed the risks of production ventures on to their customers in exchange for assuring those customers the opportunity to enjoy the benefits of successful ventures at a cost of service rate (App. B-26 B-27).

Order 102 denied rehearing of both Order 58 and Order 98. This order on rehearing gave *new and independent* reasons to support Order 58.

In *Mid-Louisiana*, the Fifth Circuit had before it petitions for review of Orders 58, 98 and 102. The Court held that on the basis of "...the language, purposes and history of the NGPA, we hold that Congress clearly intended for any production attributable to an 'interstate pipeline, intrastate pipeline or local distribution company, or any affilitate thereof' to be accorded first sale status under the NGPA and that Congress contemplated that the intracorporate transfer of pipeline production to the pipeline would be treated as the first sale." (App. A-15).

It therefore vacated Order No. 58. The Court went on to hold that since "...the Commission lacked authority to set prices for interstate pipeline production under the NGA," (App. A-15) it must vacate Order 98 without reaching the merits and that the effect of its holding " ... with respect to Order No. 58 is that the price for pipeline production will now be set under the NGPA." (App. A-15, ftn. 4). The Court did not vacate or reverse or mention Order 102 which is the final order of FERC in this rulemaking proceeding. *Ecee, Inc.* v. *FERC*, 611 F.2d 554 (5th Cir., 1980).

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the Court below should be summarily reversed because it has clearly erred in deciding an important federal question of first impression in a way that is in direct conflict with a state court of last resort, and has so far departed from the accepted and usual course of judicial proceedings as to call for *per curiam* reversal by this Court.

1. This a case which presents questions of first impression and national importance respecting the rate treatment of gas, produced in the United States by persons who are not independent producers, which is the subject of an intracorporate transfer. The decision below makes all transfers of gas produced by an interstate or intrastate pipeline or gas distributor a "first sale" under the NGPA, and vacated Order 58 on this ground. That decision also held that only the ceiling prices set in the NGPA could apply to such gas, and vacated Order 98 on that ground. NGPA prices are, with rare exceptions, substantially higher than the cost of service or area or national rates which would otherwise be used to price such intracorporate transfers so that *Mid-Louisiana* will compel huge rate increases at the Federal and State levels.[8] Thus, the decision below has a vital impact upon both FERC and State Commissions which must value self-produced gas for ratemaking purposes.

Under that decision, all gas produced during the lives of cost of service reserves owned or controlled by interstate or intrastate pipelines, or gas distributors will qualify for higher NGPA ceiling prices. In Order No. 98,

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[8]The impact of Mid-Louisiana on States is the subject of a pending petition for a writ of certiorari in *Pennzoil* v. *The Public Service Commission of West Virginia*, Case No. 81-1672, filed March 10, 1982.

FERC held that all gas produced from a cost of service *lease* was to be valued under the cost of service rate method forever. Order No. 98 applied to *all* cost of service *leases.*[9] This is true whether the lease was developed, i.e. had wells drilled thereon to prove the quantity of reserves, or was undeveloped (App. B-43). Thus, under Order 98, all new wells drilled on old cost of service leases would be priced at cost of service rates. If *Mid-Louisiana* is not reversed, however, *new wells* drilled on old cost of service leases will also be eligible for NGPA pricing.

Statistics are not available as to intrastate production, but are available to a meaningful extent for interstate pipelines. According to *"Statistics of Interstate Natural Gas Pipeline Companies-1979,"*[10] there are 26 large interstate pipelines which produce gas from reserves they own or control. These reserves comprised 8% of all reserves dedicated to interstate pipelines in 1979. The larger Class A and B pipelines owned or controlled 12,408 billion cubic feet of reserves in 1979. The dollar impact of the Court's action in vacating Order 98 depends on the difference between cost of service rates and the NGPA price consumers will pay for each

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[9]The importance of *Mid-Louisiana* is not reduced by the fact that relatively few pipelines entered into rate settlement contracts or were subject to specific Commission orders requiring the use of cost of service ratemaking on certain categories of production properties. *Mid-Louisiana* did not address these issues and did not purport to overrule *Pennzoil Company* v. *FERC*, 645 F.2d 360 (5th Cir. 1981), and *Columbia Gas Development Corp.*, v. *FERC*, 651 F.2d 1146 (5th Cir. 1981), which held that NGPA ceiling prices are not self implementing but are subject to price limitations in contracts and require filings under Sections 4 and 5 of the NGA.

[10]*Statistics of Interstate Natural Gas Pipeline Companies-1979*, U.S. Department of Energy, issued October, 1980.

thousand cubic feet of this gas over the productive life of these substantial reserves. Each $1 difference in this price equals $12.4 billion dollars over the life of these gas reserves. The range of NGPA prices now in effect is large. A recent rate filing by El Paso Natural Gas Company (El Paso), AEPCO's interstate supplier, shows that as of April 1, 1982, the lowest cost volumes under Section 104 were priced at 27.1¢ per MBTU, while Section 107(c)(5) gas was receiving $8.62 per MBTU for that same month.[11] This range could be even larger when certain NGPA categories are completely deregulated.

While it is not possible to estimate the entire impact of *Mid-Louisiana* on the rates of all pipeline producers, the present cost is known for El Paso. In its rate filing in FERC Docket TA82-2-33, El Paso claimed that implementation of that decision would increase its "purchased gas costs" by 39.15¢ per thousand cubic feet, or $259 million for the six month period ending September 30, 1982. In addition, El Paso claimed that retroactive implementation of *Mid-Louisiana* for the period December 1, 1978 through December 31, 1981 would increase its purchased gas costs by a net additional $109 million.[12] Thus, the excess of NGPA prices over cost of service rates for El Paso is at least $368 million for a 46 month period.

2. The decision below is in conflict with a decision of the highest court of a State. In *Pennzoil Company* v. *The Public Service Commission of West Virginia*, the Supreme Court of Appeals of West Virginia upheld an order of the West Virginia Public Service Commission in a rate proceeding involving a local distribution

[11]FERC Docket TA82-2-33, filed March 1, 1982.

[12]According to El Paso, the "net" effect is derived by eliminatial duplicate recovery of the same gas costs and eliminating certain special overriding royalties paid only by El Paso.

company which produced from reserves it owned or controlled a portion of the gas it sold at retail in that State. The State Commission held that under Section 2(21) of the NGPA natural gas produced by pipelines and local distribution companies is not subject to NGPA "first sale" maximum ceiling price regulation and that, therefore, such gas remained subject to cost of service ratemaking under West Virginia law. It specifically adopted the rationale followed by the FERC in Order Nos. 58 and 102 and rejected Pennzoil's arguments which were identical to those advanced before the FERC in opposition to Order Nos. 58 and 102. The State Commission after finding that Pennzoil was a "local distribution company," under NGPA Section 2(17), and that a portion of Pennzoil's sales is attributable to its production stated:

> Pennzoil would have the Commission apply first sale treatment to an intra-corporate transaction. Such a request was made of the FERC by several companies who petitioned the Commission (FERC) to reconsider § 270.203 of its final regulations promulgated in FERC Order No. 58. The FERC concluded that the regulation and enforcement of rates for sales of pipeline production should not be dependent on an event recorded solely on the books and records of the Company and that occurs without contract, bargaining, or certification. We find no reason for this Commission to follow a different conclusion.
>
> The Commission is of the opinion that *the hearing examiner's discussion of the "first sale" requirement of the NGPA is sufficient legal ground* upon which to find inappropriate Pennzoil Company's utilization of $3.31 as the lawful price for its produced gas. (At p. 15; emphasis added.)

Thus, the State Commission based its conclusion in *Pennzoil* solely on FERC's Order Nos. 58 and 102.[13]

In *Mid-Louisiana*, the Court below vacated Order No. 58 because it held that under Section 2(21) of the NGPA natural gas produced by pipelines is subject to "first sale" ceiling price regulation under the NGPA. The Court also held that under the NGPA, FERC is required to impute a sale at the wellhead for such intracorporate transfers and that it had frustrated the intent of Congress by failing to do so. This holding is in direct conflict with the decision of the West Virginia Supreme Court and Commission.

This conflict with respect to an important question regarding the interpretation and administration of the NGPA provides a sufficient basis under this Court's Rule 17.1(b) to support a grant of certiorari.

3. The Court's decision in *Mid-Louisiana* was based on its interpretation of the term "first sale" in the NGPA. The Court stated: ". . .NGPA contemplates that the pipeline is both a buyer and seller as to its own production." (App. A-8) This proposition rejects the conventional meaning of the term "sale" and conflicts with the text and the legislative history of the NGPA. The term "sale" as it is used in the definition of "first sale" is defined in Section 2(20) of the NGPA, 15 U.S.C. §3301(20). That section provides "...'sale' means any sale, exchange or other transfer for value." No consideration is paid when the production division of a pipeline transfers gas to another division of the same pipeline. While the term "transfer for value" is not defined

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[13]The hearing examiner in *Pennzoil* held that under Section 602 of the NGPA, which permits states to enforce lower charges for intrastate gas, Pennzoil could not charge NGPA prices for its production. However, the State Commission did not mention Section 602 in its decision.

anywhere in the NGPA, it is clear that it contemplates more than a mere bookkeeping entry in the accounts of one corporation. In fact, a transfer which does not encompass conveyance of title for valuable consideration is not a sale, exchange, or transfer for value. *Helvering* v. *Nebraska Bridge Supply & Lumber*, 115 F.2d 288, 290 (8th Cir., 1940). Here there is no buyer, no seller, no change of title, no consideration and no contract. Thus, under the plain language of the NGPA, there can be no statutory "sale" of gas transferred between divisions of a pipeline.

Furthermore, the entire structure of the NGPA demonstrates that it was patterned after FERC's regulation of independent producer sales under the NGA which set maximum lawful unit prices, first on an area basis and later on a nationwide basis. A true sale occurs when two unrelated parties negotiate a per Mcf or per MBTU unit price. Such parties enter into a contract and the sale is certificated. All of these elements are absent in the case of cost of service pipeline production, where there are no unit prices, no contracts, no just and reasonable rates and no fair market dealings between unrelated parties as FERC found in issuing its codified rule, 18 C.F.R. 270.203, defining a "first sale."

The Court's interpretation of "first sale" also ignores other sections of the NGPA which make it plain that such a sale relates to gas produced under contracts and sold under certificates. The NGPA reveals the Congressional purpose of perpetuating the FERC concept of prescribing only a ceiling price and preserving intact the contractual rights of the parties to negotiate a lower price. Thus, Section 101(b)(9) provides that the maximum lawful price established under the NGPA "shall not supersede or nullify the effectiveness of the price established under such contract."

Section 601(a)(1) continues FERC jurisdiction over gas which was committed or dedicated to interstate commerce on the day before enactment of the NGPA, but ends such jurisdiction when this test is not met. Section 315 of the NGPA covers the duration of contracts, bona fide offers and right of first refusal. It clearly assumes the existence of a contract. Pipelines do not make contracts with themselves to cover intracorporate transactions. The reach of this vitally important section is defined in terms of the existence of a *contract* or *certificate* in Section 2(18) which defines the term "committed or dedicated to interstate commerce." That section encompasses all natural gas in the Outer Continental Shelf and "natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any *contract*, any *certificate* under the Natural Gas Act, or any provision of such Act" (emphasis added).

Section 601(b)(1)(A) provided that the amount paid in any first sale of natural gas shall be deemed to be just and reasonable if it does not exceed the maximum lawful price established under Title I of the NGPA and paragraph (E) of that section requires that "in the case of any first sale between any interstate pipeline and any affiliate of such pipeline. . ." the amount paid also shall ". . .not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline." Surely, the absence of a similar safeguard in the case of pipeline produced gas which is the subject of an intracorporate transfer demonstrates that Congress did not intend to include such gas within the statutory concept of a "first sale." It is absurd that a pipeline which produces gas through a separately incorporated affiliate is subject to the limitation of 601(b)(1)(E) but that a pipeline which elects to conduct its business as a

single corporate entity may charge itself a higher price than it would pay to any non-affiliated producer.

4. The Court below held that since FERC lacked authority to set prices for interstate pipeline production under the NGA, that prices would have to be set under the NGPA (App. A-15). On this basis, the Court vacated Order No. 98 merely because Order No. 58 was void. This action raises an important question of first impression: Whether the NGPA terminated FERC jurisdiction under Section 1(b) of the NGA over all aspects of the pricing of natural gas.

Order 98 did not set any unit price for natural gas. Rather, it set forth FERC's policies concerning the question of whether pipelines which had received cost of service treatment would be permitted to file for higher NGPA rates. FERC assumed that intracorporate transfers of pipeline produced gas were subject only to the NGA because there were no first sales. Neither FERC nor the Court addressed the question of whether any agency jurisdiction under the NGA would have survived if intracorporate transfers of pipeline production were a statutory NGPA first sale (App. B-71). Had FERC known that a question of the relationship of its powers under the NGA and NGPA was present, it could have written this same Order in terms of its powers over *pipeline rate filings* under the NGA.

Section 601(a)(1)(B) provides that, for purposes of Section 1(b) of the NGA, the agency's jurisdiction continues to apply to "natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act" and which is not new or high cost natural gas. Clearly, Congress intended to preserve some FERC jurisdiction over

pipeline production or this section would not have been enacted. While *Pennzoil Company* v. *FERC*, 645 F.2d 360, 380 (5th Cir. 1981), held that "[g]as committed or dedicated to interstate commerce on November 8, 1978, and not removed from NGA jurisdiction by Section 601(a)(1)(B) is priced under Section 104, 106(a), 108 or 109(a)(2)" it also held that NGA Section 4 remains in effect as to such gas. Therefore, the Court held that any seller of natural gas eligible for NGPA category prices must file under Section 4 of the NGA for a rate increase and must have the right to file under the terms of its contract. *Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1155-1159 (5th Cir. 1981) held that the NGPA did not expressly repeal the filing requirements of Section 4 of the NGA and that repeals by implication are not favored and rejected Columbia's claim that the ratemaking sections of the NGA (4 and 5) "deal with *pricing jurisdiction*, when they in fact deal with *pricing authority* for gas over which the Commission has jurisdiction under NGA § 1(b)" (Emphasis added; at p. 1158, Ftn. 14). Therefore, some NGA *pricing authority* survives and the question of whether it would suffice to support part, or all, of the substantive regulations promulgated by Order 98 is a matter exclusively within the jurisdiction of the FERC.

Since this is the case, enough NGA pricing power survives to make it necessary for FERC to determine whether it should recast Order 98 in order to meet its statutory duties. This determination must be made by the regulatory agency in the first instance. The Court below plainly committed an egregious error in vacating Order 98 rather than remanding it to the agency for further consideration. Such action by the Court clearly usurped an administrative function since the powers of

the Court end when it uncovers an error of law and it must remand to the agency. *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Accordingly, AEPCO requests that if this Court denies certiorari and also denies summary reversal, it should issue a *per curiam* order directing the Court of Appeals to remand Order 98 for further consideration by FERC under the NGA and the NGPA since both of these statutes are committed to that Agency's charge.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. If appropriate, the Court should summarily reverse the decision of the Court below insofar as it vacates Order Nos. 58 and 98.

If this Court denies both the foregoing requests, it should issue a *per curiam* Order reversing the vacation of Order 98 and remanding this case to the Court of Appeals with directions to remand that Order to FERC for further consideration.

Respectfully submitted,

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ADDITIONAL STATUTES
NATURAL GAS ACT, 15 U.S.C. §§717, *et seq.*

15 U.S.C. § 717 c :

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Sec. 4(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in

rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly thechange or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

15 U.S.C. 717 d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. §717d]